BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GREGORY REED	)	
Claimant	)	
VS.	)	
	)	Docket No. 216,797
CENTRAL SAND COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the July 30, 1998 Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board heard oral argument in Wichita, Kansas, on February 12, 1999.

APPEARANCES

David H. Farris of Wichita, Kansas, appeared for the claimant. William L. Townsley of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. At oral argument to the Board, counsel stated they would attempt to provide the dates that claimant worked for the respondent after the September 1996 accident. But as of the date of this Order, that information has not been provided.

ISSUES

This is a claim for a September 11, 1996 accident. After the accident claimant continued to work for the respondent until he was laid off in either late February or early March 1997. He later found work with another company, Dondlinger and Sons Construction, and worked for it until being laid off in January 1998.

After deducting 3 percent for preexisting functional impairment, during those periods that he was laid off the Judge awarded claimant a 74.5 percent permanent partial general

disability. During the period that claimant was working for Dondlinger, the Judge awarded him a 42 percent permanent partial general disability.

Respondent and its insurance carrier contend that the Judge erred by failing to find (1) that claimant did not prove that he sustained a work-related accident on September 11, 1996; (2) that claimant did not prove he sustained either additional injury or impairment as a result of the alleged accident; (3) that claimant was not entitled to a work disability because he returned to work for the respondent at a comparable wage and then was later laid off due to economic conditions; (4) that claimant had, at most, only a 2 percent permanent partial general disability for the period from November 13, 1996, to February 28, 1997, because he worked for the respondent during that period earning a comparable wage; (5) that claimant's prior medical restrictions should be factored into the tasks loss analysis to reduce the tasks loss to only 2.56 percent instead of the 55 percent found by the Judge; (6) that claimant did not put forth a good faith effort in attempting to find employment after either layoff; (7) that the difference in claimant's pre- and post-injury wages while he worked for Dondlinger was only 19 percent instead of 35 percent; (8) that claimant's work disability should not be increased after Dondlinger laid him off; and, (9) that in addition to factoring in the preexisting work restrictions to lower the tasks loss, the Award should also be reduced by both the preexisting functional impairment pursuant to K.S.A. 44-501(c) and the credit for a prior award of compensation pursuant to K.S.A. 44-510a.

Conversely, claimant argues (1) that preexisting functional impairment should not be deducted from the Award because it was already taken into consideration by the physicians; (2) that claimant's tasks loss should not be reduced due to preexisting restrictions because claimant's job required him to violate any restrictions that he had; and, (3) that a K.S.A. 44-510a credit should not be applied for any of the following three reasons: first, respondent and its insurance carrier did not raise that issue until after the evidence was taken and the case had been submitted to the Judge for decision; second, the record fails to contain sufficient facts to properly determine the credit; and third, the respondent is not entitled to receive both a K.S.A. 44-510a credit and a reduction in the award of compensation under K.S.A. 44-501(c).

At oral argument before the Appeals Board, the parties agreed that the issues to be decided on this appeal are:

(1) Did claimant injure his back while working for the respondent on September 11, 1996?

(2) If so, did the accident cause either additional permanent injury or impairment?

(3) Before computing the task loss prong of the permanent partial general disability formula, do you reduce the work tasks considered because of preexisting restrictions?

(4) What is claimant's post-injury average weekly wage while he was working for Dondlinger?

(5) Is a credit for a prior award applicable under K.S.A. 44-510a?

(6) When a permanent partial general disability is based upon the new injury only, is the amount of preexisting functional impairment also deducted from the award pursuant to K.S.A. 1998 Supp. 44-501(c)?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

(1) Gregory Reed began working for Central Sand Company, Inc., in March 1994. He was primarily hired as a dredge operator to work on a sand dredging barge but he also performed both mechanical repairs on various pieces of heavy equipment and general labor.

(2) On September 11, 1996, Mr. Reed injured his back when he was helping others move the barge that he was on. At the time of the accident, Mr. Reed was attempting to move and free heavy cables. Mr. Reed promptly reported his back hurting to one of the company's owners, Scott Hoskinson, who was also helping to move the barge when the incident occurred.

(3) The accident caused additional injury and impairment to Mr. Reed's back. That finding is based upon the testimony of board certified orthopedic surgeon Duane Murphy, M.D., who treated Mr. Reed for both this injury and a 1993 back injury. The Board is persuaded by the doctor's testimony and records that Mr. Reed's permanent partial functional impairment increased from 3 percent to 5 percent due to the September 1996 accident.

(4) The Board is also persuaded by Dr. Murphy's testimony and records that the September 1996 accident further restricted the activities and work that Mr. Reed should do.

(5) Before the 1996 accident, Mr. Reed had permanent work restrictions and limitations that Dr. Murphy had placed on him to protect his back. Following the 1996 accident, Dr. Murphy reduced the maximum that Mr. Reed could lift from 50 to 20-25 pounds and added limited stooping and twisting to the earlier restrictions of limited bending and twisting. Although Mr. Reed may have violated those restrictions from time to time, those restrictions were appropriate as evidenced by the ongoing back problems that he experienced.

(6) Dr. Murphy agreed with the analysis of vocational rehabilitation expert Karen Crist Terrill that Mr. Reed lost 6 of 27 of his former job tasks because of the preexisting

restrictions and that he lost 5 of the remaining 21 job tasks because of the latest restrictions.

(7) After taking several months to recover from the September 1996 accident, Mr. Reed first returned to work for Central Sand in December and worked approximately two weeks before he was sent home. According to Mr. Reed, he worked one day in January 1997 and was again sent home. He again returned to Central Sand and worked for two or three weeks while others took vacation. After being off work again, he returned for his final period of employment with Central Sand. Either in late February or early March 1997, Central Sand and Mr. Reed mutually separated as the company stopped providing work that Mr. Reed could do. The record does not contain the specific dates or the specific number of days or weeks that Mr. Reed worked for Central Sand after the accident. For purposes of this claim, the Board finds that Mr. Reed last worked for Central Sand on February 28, 1997.

(8) After drawing unemployment benefits for a period of time, in late September 1997 Mr. Reed obtained full-time work earning $9.25 per hour with Dondlinger and Sons Construction. Mr. Reed continued with that job until he was laid off on approximately January 6, 1998. When he last testified in February 1998, Mr. Reed was receiving unemployment benefits.

(9) Because the Dondlinger pay stubs indicate that Mr. Reed worked 19 hours in the pay period ending Sunday September 28, 1997, the Board finds that he began working for that company on September 25, 1997.

(10) The Judge found that Mr. Reed made a good faith effort to find appropriate employment following his layoffs. The Appeals Board agrees and affirms that finding. Mr. Reed sought employment as required by unemployment rules and regulations. Further, the Board is not persuaded that Mr. Reed's efforts to find employment were disingenuous. The Board finds that Mr. Reed's job search was more than a token effort as alleged by Central Sand and its insurance carrier.

(11) The parties stipulated that the average weekly wage, excluding additional compensation items, equalled $484.50. After considering Mr. Reed's base wage, overtime, and additional compensation items, the Judge found that the average weekly wage for the period following the termination of the fringe benefits was $514.98. As that finding was not made an issue at oral argument, the Appeals Board adopts it as its own.

(12) In May 1995, Mr. Reed settled a workers compensation claim for injuries to his back and both upper extremities. In that settlement and compromise, Mr. Reed received the lump sum of $40,000 for injuries sustained in January 1993 when a forklift he was driving fell off a dock and for upper extremity injuries that he, presumably, either received in the forklift accident or from the repetitive mini-traumas that he sustained daily while performing auto body work for his employer. The settlement documents do not indicate that the

involved parties apportioned the settlement proceeds between the alleged back injury and the alleged upper extremity injuries.

CONCLUSIONS OF LAW

(1) Mr. Reed's September 1996 accident arose out of and in the course of employment with Central Sand.

(2) Because his is an "unscheduled" injury, Mr. Reed's entitlement to permanent partial general disability benefits is governed by K.S.A. 1996 Supp. 44-510e. That statute provides:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[1] and Copeland.[2] In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the injury.

(3) Finding that Mr. Reed had work restrictions and limitations for his back before the September 1996 accident and that those restrictions were appropriate, the Appeals Board concludes that those earlier restrictions should be considered when determining the tasks loss prong of the permanent partial disability formula. Therefore, the Board concludes that Mr. Reed has lost the ability to perform 5 of 21 former work tasks, or 24 percent, because of this accident.

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[1] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

(4) For that period that he continued to work for Central Sand before he was laid off, Mr. Reed has failed to prove a wage loss greater than 90 percent of his pre-injury average weekly wage. Therefore, for that period between the date of accident and February 28, 1997, Mr. Reed is entitled to receive his temporary total disability benefits and a 2 percent permanent partial general disability.

(5) For the period from March 1, 1997, through September 24, 1997, when Mr. Reed was laid off and looking for employment, the difference between his pre- and post-injury wages for purposes of the permanent partial general disability formula is 100 percent. Likewise, for the period following January 6, 1998, when Dondlinger laid off Mr. Reed, the wage loss is 100 percent.

(6) By comparing pre- and post-injury wages, the Legislature intended to quantify the economic loss that a worker sustained because of a work-related accident.

(7) In comparing the pre- and post-injury wages for the wage loss prong of the permanent partial disability formula, one should use the provisions of K.S.A. 44-511 with slight modification in order to consider true economic loss. For example, additional compensation items should be included in comparing pre- and post-injury wages as those benefits represent true economic value.

(8) Dondlinger hired Mr. Reed to work full time. In fact, he initially worked more than 40 hours per week and earned overtime wages for four consecutive weeks. Using the average weekly wage formula of K.S.A. 44-511, the Board finds Mr. Reed's average weekly wage at Dondlinger was $421.72 which is comprised of $370 for straight time ($9.25 per hour X 40 hours) and $51.72 per week for overtime ($568.90 ÷ 11). In computing the average overtime, the Appeals Board excluded the first and last weeks that Mr. Reed worked for Dondlinger because they were only partial weeks. Likewise, the Board excluded the three weeks that Mr. Reed did not work at all for the pay periods ending December 21 and December 28, 1997, and January 11, 1998.

(9) As indicated in the findings above, Mr. Reed's post-injury average weekly wage with Dondlinger was $421.72. Comparing that wage to the $514.98 average weekly wage at Central Sand yields an 18 percent difference. Therefore, for that period from September 25, 1997, through January 6, 1998, when Mr. Reed worked for Dondlinger, the wage loss is 18 percent.

(10) As required by the permanent partial general disability formula, the Board averages the 24 percent tasks loss and the 100 percent wage loss and concludes that Mr. Reed has a 62 percent permanent partial general disability following his layoffs at Central Sand and Dondlinger. Averaging the 24 percent tasks loss with the 18 percent wage loss yields a 21 percent permanent partial general disability during that period Mr. Reed was employed by Dondlinger.

(11) Based upon the above, Mr. Reed's permanent partial general disability is (1) 2 percent through February 28, 1997; (2) 62 percent from March 1, 1997, through September 24, 1997; (3) 21 percent from September 25, 1997, through January 6, 1998; and (4) 62 percent from January 7, 1998, until the award is paid or modified by the Director.

(12) The Judge acted properly by refusing to apply a K.S.A. 44-510a credit for the 1995 settlement for three reasons.

First, the credit issue was not raised in a timely manner as it was not raised until after the parties had submitted their evidence and cases to the Judge for decision. Therefore, Mr. Reed did not have an opportunity to submit evidence on that issue. The Board's review is limited to questions of law and fact presented to the administrative law judge.[3]

Second, the credit would only be applicable, if at all, to that portion of the settlement proceeds that represent benefits for the back injury. And there is insufficient information in the record to make such an apportionment without speculating.

Third, when a worker's permanent partial general disability is either based upon the increased amount of functional impairment only or a task loss percentage that is based upon the additional new work restrictions only and not upon any of the preexisting restrictions, the preexisting injury has been accounted for and the resulting permanent partial general disability measures and quantifies only that loss caused by the later accident. Under that analysis, the earlier impairment or injury has not contributed to the resulting permanent partial disability in any manner.

(13) Likewise, when a worker's permanent partial general disability is either based upon the increased amount of functional impairment only or a task loss percentage that is based upon the additional new work restrictions only and not upon any of the preexisting restrictions, the preexisting functional impairment has been accounted for in determining the permanent partial general disability and, therefore, the preexisting functional impairment rating should not also be deducted from the award under K.S.A. 1998 Supp. 44-501(c). Otherwise, there will be a double deduction for the preexisting injury.

(14) For future reference, a party's brief should reference the facts to the transcript and page where they may be found.

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[3] K.S.A. 44-555c; *also see,* Scammahorn v. Gibraltar Savings & Loan Assn., 197 Kan. 410, 416 P.2d 771 (1966).

AWARD

WHEREFORE, the Appeals Board modifies the July 30, 1998 Award.

Gregory Reed is granted compensation from Central Sand Company, Inc., and its insurance carrier for a September 11, 1996 accident and a resulting permanent partial general disability.

For the period from September 11, 1996, through February 28, 1997, and based upon an average weekly wage of $484.50, Mr. Reed is entitled to receive 9 weeks of temporary total disability benefits at $323.02 per week, or $2,907.18, and 8.3 weeks of permanent partial disability benefits at the same rate, or $2,681.07, for a 2% permanent partial disability.

For the period from March 1, 1997, through September 24, 1997, and based on an average weekly wage of $514.98, Mr. Reed is entitled to receive 29.71 weeks of permanent partial disability benefits at $338 per week, or $10,041.98, for a 62% disability.

For the period from September 25, 1997, through January 6, 1998, Mr. Reed is entitled to receive 14.86 weeks of permanent partial general disability benefits at $338 per week, or $5,022.68, for a 21% disability.

For the period commencing January 7, 1998, Mr. Reed is entitled to receive 204.43 weeks of benefits at $338 per week, or $69,097.34, for a 62% permanent partial general disability and a total award of $89,750.25.

As of March 26, 1999, there are 9 weeks of temporary total and 116.3 weeks of permanent partial disability benefits payable totaling $42,092.25, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $47,658.00 is to be paid for 141 weeks at $338 per week until fully paid or further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority's analysis that preexisting restrictions should be used to eliminate work tasks before the task loss percentage is calculated. The majority's analysis is a major deviation from past Board decisions.[4]

The question whether work tasks are to be eliminated because of preexisting work restrictions goes to the basic question whether Kansas is a "full disability" or "apportionment" state.

Before the 1993 legislative changes, Kansas was a full disability state as an employer was responsible for the full extent of the resulting disability instead of only the proportion caused by the new injury. The Workers Compensation Fund then contributed to the extent the preexisting impairment contributed to the ultimate disability.

> The risk of employing a workman with a pre-existing disability is upon the employer, and when a workman who is not in sound health is accepted for employment and a subsequent industrial injury aggravates his condition, resulting in disability, he is entitled to be fully compensated for the resultant disability.[5]
>
> Absent a statute to the contrary, where a workman's disability arises out of and in the course of his employment, there can be no reduction or prorating of the disability due to the accident itself and that due to [an] employee's pre-existing physical condition.[6]
>
> A previous permanent partial disability award does not affect the right of a worker to receive permanent disability benefits for a subsequent injury.[7]
>
> Where a preexisting condition is aggravated or accelerated by an injury, it is error to apportion an award between the disability resulting from the injury and the disability resulting from a preexisting condition.[8]

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[4] See Rios v. National Beef Packing Company, Docket No. 190,653 (March 1997); Carver v. Missouri Gas Energy, Docket No. 195,270 (July 1997); and Maberry v. Rubbermaid Specialty Products, Docket No. 186,053 (October 1997).

[5] Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978); *also see,* Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P. 2d 751 (1976).

[6] Poehlman v. Leydig, 194 Kan. 649, 400 P.2d 724 (1965).

[7] Hampton v. Professional Security Co., 5 Kan. App. 2d 39, 611 P.2d 173 (1980).

[8] Claphan v. Great Bend Manor, 5 Kan. App. 2d 47, 611 P.2d 180 (1980).

In defining permanent partial general disability, K.S.A. 44-510e is silent regarding preexisting impairment and restrictions. But the Act provides in other sections that there should be a credit for prior awards when the "prior disability contributes to the overall disability following the later injury".[9] And that "any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting".[10] If Kansas is now an apportionment state, those statutes are superfluous.

Knowing the history of the Workers Compensation Act and the significant difference between the apportionment and full disability theories, I believe the legislature would have been clear in its 1993 amendments if it had intended to adopt the apportionment theory to make such a major change in the law.

I also disagree with the majority's finding of post-injury average weekly wage during the period that Mr. Reed was employed by Dondlinger. Although Mr. Reed regularly worked less than 40 hours per week, the majority has imputed a 40-hour work week. Excluding the first and last pay stubs as they represent only partial weeks, five of the remaining 11 pay stubs show that Mr. Reed worked less than 40 hours per week. Using those remaining 11 stubs, Mr. Reed earned $4,204.24, or an average of $366.23 per week while employed by Dondlinger. Because we are attempting to determine the economic loss that Mr. Reed sustained while he was working for Dondlinger, I believe that using actual wages, instead of imputing a 40-hour work week, better quantifies that loss.

The majority has erred by apportioning Mr. Reed's disability and by imputing a 40-hour work week.

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BOARD MEMBER

c: David H. Farris, Wichita, KS
William L. Townsley, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director

[9] K.S.A. 44-510a.

[10] K.S.A. 44-501(c).